Nos. 77-1163, 77-1164, 77-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

DR. E. RICHARD FRIEDMAN, ET AL., *Appellants*
v.
DR. N. JAY ROGERS, ET AL.

DR. N. JAY ROGERS, ET AL., *Appellants*
v.
DR. E. RICHARD FRIEDMAN, ET AL.

TEXAS OPTOMETRIC ASSOCIATION, INC., *Appellant*
v.
DR. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court For the Eastern District of Texas

---

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE, WITH BRIEF ATTACHED

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, ET AL., *Appellants*

v.

DR. N. JAY ROGERS, ET AL.

No. 77-1164

DR. N. JAY ROGERS, ET AL., *Appellants*

v.

DR. E. RICHARD FRIEDMAN, ET AL.

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., *Appellant*

v.

DR. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court
For the Eastern District of Texas

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE

The American Optometric Association hereby moves for leave to file the attached brief as amicus curiae in support of the position of the Texas Attorney General and the Texas Optometric Association, Inc. The basis for this motion is the following:

1. We have obtained and lodged with the Clerk written consents for the filing of this brief from Dr. E. Richard Friedman, et al. (appellants in No. 77-1163, appellees in No. 77-1164) and from the Texas Optometric Association, Inc. (appellant in No. 77-1186). Dr. N. Jay Rogers, et al. (appellants in No. 77-1164, appellees in Nos. 77-1163 and 77-1186) have withheld consent, thereby making this motion necessary.

2. The American Optometric Association is a nonprofit national professional association incorporated in Ohio. It consists of more than 20,000 members, who are licensed doctors of optometry, optometry students, and educators. The objects of the Association, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry."

3. A doctor of optometry is a primary provider of vital health care services who examines, diagnoses and treats conditions of the vision system. He is specifically educated, trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye disease or other abnormalities. Where appropriate, he prescribes and may dispense and adapt lenses or other optical aids. He may also use vision training or other methods of treatment to preserve or restore maximum efficiency of vision.

4. As the national professional organization representing the optometric association, the Association is vitally interested not only in legislation to improve the practice and standards of the profession itself, but also in legislation ensuring competent vision care and quality ophthalmic materials and protecting the public against deception and improper practices by any eye care provider. The Association also is vitally interested, from a national perspective, in important litigation involving challenges to the validity of such legislation. This is particularly true where, as here, the statute is challenged on federal constitutional grounds and the implications of the case are national in scope.

5. With the consent of the parties, the American Optometric Association participated as amicus curiae in this Court in *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483 (1955), filing and arguing orally before the Court. The Association filed a brief amicus curiae with the consent of the parties in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). And in *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963), the Association filed a brief amicus curiae, the Court having granted the Association's motion for leave to file such a brief.

6. This case is also of interest to the Association because one of the Texas statutes at issue, Texas Optometry Act § 2.02, provides that two-thirds of the Texas Optometry Board must be members of "a state optometric association recognized by and affiliated with the American Optometric Association."

For the foregoing reasons, the motion for leave to file the attached brief amicus curiae should be granted.

Respectfully submitted,

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

JUNE 1978

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1163

DR. E. RICHARD FRIEDMAN, ET AL., *Appellants*

v.

DR. N. JAY ROGERS, ET AL.

No. 77-1164

DR. N. JAY ROGERS, ET AL., *Appellants*

v.

DR. E. RICHARD FRIEDMAN, ET AL.

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION, INC., *Appellant*

v.

DR. N. JAY ROGERS, ET AL.

On Appeal From the United States District Court
For the Eastern District of Texas

BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION AS AMICUS CURIAE

STATUTES INVOLVED

The Texas Optometry Act, Art. 4552, Tex.Rev.Civ. Stat.Ann. (Acts 1969, 61st Leg., p.1298, ch.401), provides in relevant part:

> Art. 4552-5.13. *Professional responsibility*
>
> * * * * * * * *
>
> (d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In the event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act, whichever period shall be the longer.
>
> Art. 4552-2.02. *Qualifications of members*
>
> To be qualified as a member of the [Texas Optometry B]oard a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION

The interest of the American Optometric Association [AOA] is set forth in the Association's motion for leave to file this brief amicus curiae in support of the position of the Texas Attorney General and the Texas Optometric Association, Inc.

SUMMARY OF ARGUMENT

I. The constitutional validity of section 5.13(d) of the Texas Optometry Act, which prohibits optometrists from practicing under a "trade name," is established by two independent grounds. The statute is valid, first of all, as a reasonable regulation of optometrists' conduct, with only an incidental prohibition against the advertising of illegal conduct. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388-389 (1972). There is a sphere of conduct by optometrists, separate from speech, that is barred by the "trade name" statute. This conduct consists of a form of business organization where a trade name owner employs individual optometrists and may often control the volume of patients they treat. This method of operation, the Texas legislature could find, was conducive to mass-produced, depersonalized and often inferior professional eye care.

Texas constitutionally could prohibit this type of business conduct by optometrists. *See Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). Having done so, the state quite properly could ban advertising for the prohibited "trade name" conduct. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations, supra.* This is all that the Texas "trade name" statute does. No special First Amendment justification is required for the statute. *Id.*

Quite apart from these considerations, Texas' power to outlaw misleading advertising independently supports the "trade name" statute's restrictions on commercial speech. "Trade name" advertising by Texas optometrists in earlier years proved to be misleading to consumers. *See Texas State Bd. of Examiners* v. *Carp,* 412 S.W.2d 307 (Tex.S.Ct.), *cert. denied,* 389 U.S. 52 (1967). It communicated the misimpression that the trade name organization (rather than an individual optometrist) was professionally responsible for and licensed to provide optometric eye care. *Id.* Moreover, it falsely implied that differences in trade names meant the existence of competition, and differences in optometric care at different trade name locations. *Id.*

Whether or not Texas has outlawed "trade name" optometric practice and conduct, it could rationally bar "trade name" advertising by optometrists to prevent these harms. *See Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977). This is true notwithstanding the theoretical availability of "less restrictive" state laws requiring additional disclosures to compensate for the misleading aspects of a "trade name" optometric advertisement. To hold otherwise would mean that states (and the federal government) could never

ban a generic form of commercial advertising as misleading.

II. The three-judge court correctly upheld the requirement that two-thirds of the six-man Texas Optometry Board be members of "a state optometric association recognized by and affiliated with the American Optometric Association." [Texas Optometry Act § 2.02.] Whatever the private views of the two-thirds majority, the composition of the Board does not create any objective "chill" on optometrists' First Amendment rights (now recognized and accepted in Texas) of commercial speech and advertising. This case presents no Article III "case or controversy" with respect to the alleged "pecuniary" bias of the Board in exercising its adjudicatory functions. Compare *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). The Texas Board is not disqualified from exercising its rule-making powers by Rogers' claims that the two-thirds majority allegedly have a pecuniary interest or fixed point of view. K. Davis, *Administrative Law of the Seventies* § 12.01 (July 1977 Cum. Supp. p.114).

The Texas legislature could rationally believe that the challenged two-thirds membership requirement would ensure that the majority of the Board would be economically independent optometrists, more likely than high-volume "commercial" optometrists to emphasize high quality eye care and the enforcement of the Texas Optometry Act. No private group is totally excluded from the Texas Board. Nor is membership on the Texas Board conditioned, directly or indirectly, on an optometrist's willingness to forego his First Amendment rights of commercial speech. The membership classification, which is rooted in health care considerations, easily passes muster under traditional

equal protection analysis. *See Weinberger* v. *Salfi,* 422 U.S. 749, 769-774 (1975). Since the classification is neither "suspect" nor bears upon a fundamental constitutional interest, the "irrebutable presumption" doctrine does not apply here. *Id.*

ARGUMENT

I. THE TEXAS OPTOMETRY ACT'S BAN ON "TRADE NAME" OPTOMETRIC PRACTICE COMPORTS WITH THE FIRST AMENDMENT.

The major First Amendment issue in these consolidated cases concerns the validity of section 5.13(d) of the Texas Optometry Act, which prohibits optometrists from *practicing* under a "trade name". These cases do not involve a blanket ban on optometrists' advertising.[1] Nor does the "trade name" statute raise any question of restrictions on political speech or conduct.[2]

A. The "Trade Name" Practice Ban Is Valid As A Regulation Of Conduct, With An Incidental Prohibition Against The Advertising Of Illegal Conduct.

Two independent grounds support the constitutionality of Texas' ban on "trade name" optometric prac-

[1] No appeal has been taken from that part of the three-judge court's judgment that strikes down Texas' blanket ban on price advertising by optometrists (see 438 F.Supp. at 429).

[2] Texas' ban on "trade name" optometric practice is strictly limited to a "commercial" context. Compare *First National Bank of Boston* v. *Bellotti* (S.Ct. No. 76-1172, April 26, 1978). It applies only "in connection with [the] practice of optometry," which section 1.02 of the Texas Optometry Act defines as the actual examination and measurement of eyes and the fitting of corrective lenses or prisms. The statute is part of Texas' regulation of vital health care services. The states have a special responsibility for the regulation of the professions concerned with health care. Cf. *Ohralik* v. *Ohio State Bar Ass'n* (S.Ct. No. 76-1650, May 30, 1978) (slip op. p. 12).

tice. To begin with, the statute is valid as a reasonable regulation of conduct by optometrists that strikes at commercial speech only to the extent of prohibiting the advertising of illegal conduct. Cf. *Ohralik* v. *Ohio State Bar Ass'n* (S.Ct.No. 76-1650, May 30, 1978) (slip op. p.8); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388-389 (1972). There is a sphere of conduct, separate from speech, that is validly banned by the Texas "trade name" statute. *See also United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). Texas quite properly could outlaw advertising for prohibited "trade name" conduct, when it banned the conduct itself. *Pittsburgh Press Co., supra.* This is all that the Texas statute does. No special First Amendment justification is required for the statute. *Id.*

Texas' ban on "trade name" optometric practice strikes at far more than "trade name" advertising to the general public. The statute bars an entire form of business organization and conduct. Based on experience in Texas (see App. 106-107, 109-113, 115, 122-126, 128-131), the Texas legislature could find that this type of organization and conduct by optometrists was conductive to mass-produced, depersonalized and often inferior professional eye care. These harms were traceable, in Texas' experience, to factors such as trade name owners' control over individual optometrists and the volume of patients they must treat in a "trade name" practice. *See Texas State Bd. of Examiners* v. *Carp,* 412 S.W.2d 307 (Tex. S.Ct.), cert. denied, 389 U.S. 52 (1967); App. 103-105, 109, 133-136, 138. The complex of harms, which the Texas statute seeks to avert, are not derived solely from the way consumers can be expected to react to "trade

name" advertising. Many of these harms would arise even if "trade name" optometric practice had no *communicative* significance whatever. Texas' ban on "trade name" optometric practice therefore "furthers an important or substantial governmental interest [that] is unrelated to the suppression of free expression." *United States* v. *O'Brien, supra,* 391 U.S. at 377.

The whole pattern of conduct associated with "trade name" optometric practice has validly been made unlawful in Texas. Cf. *Head* v. *New Mexico Board,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). The "trade name" practice prohibition is rooted in the state's legitimate desire to ensure that commercial pressures do not undercut the provision of high quality eye care by optometrists. The validity of this type of law—which "attempt[s] to free the profession, to as great an extent as possible, from all taints of commercialism" (*Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 491)—is clearly established under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Williamson* v. *Lee Optical Co., supra* [upholding Oklahoma statute barring commercial retailers from renting space in retail stores to optometrists]; *Roschen* v. *Ward,* 279 U.S. 337 (1929) [upholding New York statute barring retail sale of eyeglasses without attending licensed physician or optometrist]; *Wall* v. *American Optometric Association,* 379 F.Supp. 175 (N.D.Ga.), affirmed, 419 U.S. 888 (1974) [upholding Georgia rule prohibiting practice of optometry in office identified with a mercantile establishment].[3] As

[3] See, also, *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores,* 414 U.S. 156 (1973) [upholding North Dakota statute requiring ownership of pharmacies to be by registered pharmacist,

this Court recently emphasized, "the State bears a special responsibility for maintaining standards among members of the licensed professions." *Ohralik* v. *Ohio State Bar Ass'n* (S.Ct. No. 76-1650, May 30, 1978) (slip op. p.12).

The only restrictions on commercial speech entailed by the "trade name" practice ban, in section 5.13(d) of the Texas Optometry Act, are restrictions on the advertising of illegal conduct. The three-judge court therefore erred in invalidating Texas' ban on "trade name" optometric practice. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal * * * is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 389 (1972); see, also, Note, *Freedom of Expression in a Commercial Context,* 78 Harv.L.Rev. 1191, 1195 (1965).

Optometrists who wish to engage in "trade name" practice and conduct cannot immunize themselves from the ban of Texas law by expressing a desire to advertise the very conduct that Texas has outlawed. A "State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a

or by corporation or association with majority stock owned by registered pharmacists actively engaged in operation of the pharmacy]; *Semler* v. *Oregon State Bd of Dental Examiners,* 294 U.S. 608 (1935) [upholding Oregon statute denying corporations the right to practice dentistry]; *Garcia* v. *Texas State Bd of Medical Examiners,* 384 F.Supp. 434 (W.D.Tex. 1974), affirmed, 421 U.S. 995 (1975) [upholding Texas statute barring laymen from forming corporation for practice of medicine].

component of that activity." *Ohralik* v. *Ohio State Bar Ass'n* (S.Ct. No. 76-1650, May 30, 1978) (slip op. p.9).

B. Texas' Power To Outlaw Misleading Advertising Independently Supports The Statute's Restrictions On Commercial Speech.

The other independent ground supporting the Texas statute, as against Rogers' challenge that it improperly restricts commercial speech, is rooted in the state's valid power to restrict misleading advertising. See *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977); *Young* v. *American Mini Theatres,* 427 U.S. 50, 68 (1976). Whether or not Texas outlaws "trade name" optometric practice and conduct, it may ban "trade name" advertising directly if such advertising is misleading or potentially deceptive. *See Federal Trade Comm'n* v. *Algoma Lumber Co.,* 291 U.S. 67 (1934) [trademark "California White Pine" banned as misleading by FTC].

The Texas legislature could conclude, based on extensive experience with "trade name" optometry in Texas, that "trade name" advertising by optometrists was significantly misleading. Though Texas licenses only individual optometrists, trade name advertising misled some consumers into thinking that the trade name organization was professionally responsible for and licensed to provide optometric eye care.[4] *Texas State Bd of Examiners* v. *Carp,* 412 S.W.2d 307, 312 (Tex.

[4] In seeking to prevent this kind of consumer confusion, the Texas "trade name" statute is similar to the laws of more than twenty other states that bar optometric practice under an assumed name or any name other than that of the optometrist (see Appendix A, *infra,* pp. 1a-4a).

S.Ct.), cert. denied, 389 U.S. 52 (1967). Optometrists advertising under a trade name often gave the impression that certain optometrists were present at a particular office, whereas in fact they were not. *Id.,* 412 S.W.2d at 313. Moreover, Texas experienced several instances where one individual owned many different trade names and advertised them as separate optometric entities, even though optometrists were "shifted from one location to the other" at the whim of the overall owner, trade names were changed at random, and each trade name entity "dispense[d] the same optical goods and services and use[d] the same kind of equipment." *Id.,* 412 S.W.2d at 311-312; App. 101, 103. This trade name advertising was misleading because it implied the existence of competition, and differences in optometric care at different trade name locations, that simply did not exist. Cf. *Consolidated Book Publishers* v. *Federal Trade Comm'n,* 53 F.2d 942 (7th Cir. 1931), cert. denied, 286 U.S. 553 (1932).[5]

To be sure, trade name advertising by optometrists (assuming that trade name practice were legal) might incidentally communicate some truthful commercial information. But such advertising can still be misleading. The Texas legislature could reasonably conclude, based on actual experience in Texas, that trade name

[5] The court of appeals in *Consolidated Book Publishers* upheld an FTC determination that banned the sale of a cyclopedia under two different names as an "unfair" method of competition. See, also, Texas Deceptive Trade Practices—Consumer Protection Act (Tex. Bus. & Comm. Code, Acts 1973, 63d Leg., p. 322, ch. 143 (effective May 21, 1973)) § 17.46(b)(2), (3) [misleading commercial practices defined to include "causing confusion" as to "the source, sponsorship, approval, or certification of goods or services" or as to "affiliation, connection, or association with, or certification by, another"].

optometric advertising was a generic form of commercial speech that entailed a significant potential for deception.

Where one form of commercial speech consists of half truths or entails a significant potential for deception, it can be legislatively banned in that form, even where the misleading speech also contains some truthful information. This is true notwithstanding the theoretical availability (see also 438 F.Supp. at 431 n.3) of "less restrictive" state laws requiring additional disclosures to compensate for the deceptive aspects of a misleading commercial communication. To hold otherwise would mean that states (or the federal government) could never ban a generic form of advertising as misleading.[6]

The overbreadth doctrine of the First Amendment has no proper application in this commercial advertising context. *See Ohralik* v. *Ohio State Bar Ass'n* (S. Ct.No. 76-1650) (slip op. p.15 n.20); *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 380-381 (1977); *Virginia Pharmacy Bd.* v. *Virginia Consumers Council,* 425 U.S. 748, 772 n.24 (1976). There is at most only a theoretical possibility of overbroad application, and the Texas statute legitimately bans a wide range of misleading advertising. *See also Parker* v. *Levy,* 417 U.S. 733, 760-761 (1974); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973).

---

[6] This case involves a test of basic legislative power to regulate one form of commercial advertising, not a choice of proper procedures for agencies selecting remedies to combat misleading advertising. Compare *Siegel* v. *Federal Trade Comm'n*, 327 U.S. 608 (1946) [before ordering ban on misleading trademark, FTC must first consider whether deceptive aspect of the mark can be eliminated by requiring affirmative disclosures]; *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933) [same].

Texas today allows price advertising by optometrists. Indeed, the state leaves open "ample alternative channels for communication" in nondeceptive words of all truthful commercial information about optometrists. *See Virginia Pharmacy Bd.* v. *Virginia Consumers Council, supra,* 425 U.S. at 771. Within this context, Texas constitutionally may ban "trade name" advertising by optometrists, as a misleading generic form of commercial speech. In the absence of controlling federal legislation,[7] the Constitution permits each state to decide for itself whether to permit or prohibit this narrow form of commercial advertising, in light of local conditions.

II. NEITHER THE FIRST AMENDMENT NOR THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT BAR TEXAS' REQUIREMENT THAT TWO-THIRDS OF THE TEXAS OPTOMETRY BOARD BE MEMBERS OF AN AOA-AFFILIATED STATE OPTOMETRIC ASSOCIATION.

Two-thirds of the six-man Texas Optometry Board are required to be members of "a state optometric association which is recognized by and affiliated with the American Optometric Association." [Texas Optometry Act § 2.02.] The only such state association is the Texas Optometric Association [TOA] (App. 234). The

---

[7] We note that the Federal Trade Commission very recently promulgated a trade regulation rule on advertising ophthalmic goods and services. 43 Fed. Reg. 23992-24008 (June 2, 1978). The impact of this rule on state laws banning some categories of commercial advertising as misleading is not entirely clear. However, the FTC rule does not seem to disturb state laws regulating *conduct* by optometrists and incidentally barring the advertising of illegal conduct. The FTC rule, which will become effective July 3, 1978 unless stayed, is being challenged in court. See *American Optometric Association* v. *Federal Trade Comm'n* (C.A. D.C. No. 78-1461).

three-judge court correctly upheld the two-thirds membership requirement against challenges based on the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

1. Texas has accepted the three-judge court's ruling that the state must permit truthful commercial advertising by optometrists. There is no evidence in this record to suggest, and this Court cannot assume, that the Texas Optometry Board will disregard this settled constitutional result or will illegally attempt to "chill" optometrists who wish to advertise. Cf. *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975); *O'Shea* v. *Littleton,* 414 U.S. 488, 495-496 (1974); and see App. 69-70, 375. Ample court remedies exist in the unlikely event that such abuses might arise. The mere existence of the Texas Optometry Board, as presently constituted, does not create a cognizable "chill" on optometrists' First Amendment rights to advertise. See *Laird* v. *Tatum,* 408 U.S. 1, 11 (1972). This conclusion is buttressed by the special hardiness of commercial advertising and the continuing incentives for those optometrists who wish to advertise to do so, as permitted under Texas law. *See Bates* v. *State Bar of Arizona,* 433 U.S. 350, 380-383 (1977).

2. This case does not involve any threatened or pending license revocation proceedings or other adjudicatory action by the Texas Optometry Board. Compare *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). Questions about the alleged "pecuniary" bias of the Board (Rogers J.S. p.15) may or may not arise in future cases, depending upon what issues the Board resolves in a particular adjudicatory context. No Article III "case or controversy" is presented with respect to appellant Rogers' claims of adjudicatory bias, and

there is no occasion to address these claims now. See also *Christian* v. *New York State Department of Labor,* 414 U.S. 614, 622-624 (1974).

Moreover, Rogers' complaints about the "viewpoint" and "basic belief[s]" of the TOA majority on the Texas Board (Rogers J.S. pp.12,13,14) do not establish a due process violation in the composition of the Board. A "crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." K. Davis, Administrative Law Treatise § 12.01 (1958 ed.). See *Hortonville Joint School District No. 1* v. *Hortonville Education Ass'n,* 426 U.S. 482, 493 (1976); *Federal Trade Comm'n* v. *Cement Institute,* 333 U.S. 683, 701 (1948); *Carolina Environmental Study Group* v. *United States,* 510 F.2d 796, 801 (D.C.Cir. 1975). Rogers' claims that the TOA majority has a pecuniary interest or fixed point of view clearly do not disqualify the Texas Board from exercising its rule-making powers under Texas Optometry Act § 2.14. K. Davis, *Administrative Law of the Seventies* § 12.01 (July 1977 Cum. Supp. p.114).

3. Equally without merit are Rogers' equal protection challenges to the composition of the Texas Board. Traditionally, states have often required their administrative boards to include some members from particular private organizations with expertise (and also a viewpoint and possible economic interest) in the regulated subject matter area.[8] Texas is one of thir-

[8] The many cases that uphold statutes requiring state board members to belong to a particular private organization, or requiring members to be nominated by such organizations, include: *Seidenberg* v. *New Mexico Bd of Medical Examiners,* 80 N.M. 135, 452 P.2d 469, 472-473 (N.M. 1969); *In re Opinion of the Justices,* 252 Ala. 559, 42 So.2d 56 (Ala. 1949); *Prosterman* v. *Tennessee*

teen states that either require some members of their optometry boards to belong to a state optometric association, or require the State to select some board members from a list of nominees prepared by such an association. See Appendix B, *infra,* pp. 5a-6a. The courts have consistently upheld these statutes against due process and equal protection attacks. See, *e.g., McCrory* v. *Wood,* 277 Ala. 426, 171 So.2d 241, 245 (Ala. 1965); *Marks* v. *Frantz,* 179 Kan. 638, 298 P.2d 316, 322-325 (Kan. 1956).

Given its history, Texas legitimately could require that a majority of the Texas Board be knowledgeable optometrists likely to be economically independent, as well as likely to emphasize high quality eye care and to enforce the legislative rules of the Texas Optometry Act. The Texas legislature could rationally believe (see App. 234-237, 249-252, 253-254) that these qualities are more likely to be found in members of the Texas Optometry Association [TOA] than in "commercial" optometrists who often are subject to the economic pressures of a high-volume commercial practice. See App. 108, 111, 122-126, 128-131, 136-139, 158-159, 160-161, 244-245, 307, 310, 311, 313. The challenged two-thirds membership rule for the Texas Board is thus rationally related to the achievement of legitimate state goals. See *New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955).

Texas constitutionally could require that two-thirds of the Texas Optometry Board be members of a professional association, without "substantial restraint

---

State Bd. of Dental Examiners, 168 Tenn. 16, 73 S.W.2d 687 (Tenn. 1934); *Bradley* v. *Board of Zoning Adjustment of City of Boston,* 255 Mass. 160, 150 N.E. 892, 894 (Mass. 1926).

upon * * * freedom of association" (*NAACP* v. *Alabama,* 357 U.S. 449, 462 (1958)). The challenged Texas statute makes a distinction between two groups (the two-thirds majority that belong to an AOA-affiliated state optometric association and the one-third that do not) that is based on economic and health care reasons, not political or free speech reasons. Neither group is totally excluded from the Board. [Texas Optometry Act § 2.02.] Membership on the Texas Board is not conditioned, directly or indirectly, on an optometrist's willingness to forego his First Amendment right to engage in truthful commercial advertising. The Texas Board includes non-TOA members who commercially advertise (App. 9, 389). Moreover, commercial speech rights may also be exercised by the two-thirds majority of the Texas Board who are TOA members.[9] The valid state interests supporting the two-thirds membership requirement—which is designed to ensure independent decision-making and an emphasis on high quality eye care by the Board—justify any possible incidental impact on associational freedoms. Cf. *Buckley* v. *Valeo,* 424 U.S. 1, 14-23 (1976).

---

[9] Rogers' Jurisdictional Statement errs in claiming (p. 5) that the AOA Code of Ethics and Rules of Practice, which TOA has chosen to recognize and enforce (see App. 415), "prohibit any form of advertising". Without discussing the history and meaning of the Supplements to the AOA Code, it is sufficient to point out that the "Supplements" upon which Rogers relies were deleted in 1976.

The current AOA statement concerning optometrists' advertising is contained in its "Standards of Conduct" section titled "Informing the Public" (effective March 10, 1976). The section simply states: "An optometrist should honor the applicable provisions of valid State and Federal laws and rules regarding the advertising of ophthalmic materials and the disseminating of information regarding professional services."

The two-thirds membership requirement for the Texas Board creates a classification that is neither "suspect," nor bears upon a fundamental constitutional interest. *See Weinberger* v. *Salfi,* 422 U.S. 749, 769-774 (1975). The membership classification, which is rooted in health care considerations, easily passes muster under traditional equal protection analysis. *Id.*

Rogers' reliance on the "irrebutable presumption" doctrine to attack the two-thirds membership requirement (Rogers J.S. pp. 15, 16) is misplaced. That very limited doctrine does not apply here, since the Texas statutory classification is neither suspect nor bears upon fundamental constitutional rights. To rule otherwise would turn the "irrebutable presumption" doctrine into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Weinberger* v. *Salfi, supra,* 422 U.S. at 772; see also Note, *The Irrebutable Presumption Doctrine in the Supreme Court,* 87 Harv. L.Rev. 1534 (1974).

CONCLUSION

The challenged Texas statutes, prohibiting "trade name" optometric practice and requiring that two-thirds of the Texas Optometry Board be members of an AOA-affiliated state optometric association (Texas Optometry Act §§ 5.13(d), 2.02), are constitutionally valid. The judgment in Nos. 77-1163 and 77-1186 should be reversed, while the judgment in No. 77-1164 should be affirmed.

Respectfully submitted,

ELLIS LYONS
BENNETT BOSKEY
EDWARD A. GROOBERT
EDWIN E. HUDDLESON, III
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 737-6580

Attorneys for the American Optometric Association

JUNE 1978

APPENDIX

APPENDIX A

There are more than twenty states besides Texas that prohibit optometrists from practicing under an assumed name or any name other than that of the optometrist:

1. Alabama: ALA.CODE tit.34 § 22-23(11) [optometrist's license may be revoked for practicing "under a name other than one's own name as set forth on the license certificate"]

2. Arizona: ARIZ.REV.STAT. § 32-1755 (11) [optometrist's license may be revoked for the "practice of optometry under a false or assumed name"]

3. Hawaii: HAW.REV.STAT. § 459-9(9) [Hawaii board may refuse to issue certificate to optometrist, if he uses "any name in connection with his practice other than the name under which he is licensed to practice * * *"]

4. Idaho: IDAHO CODE § 54-1510(2) [optometrist's license may be revoked for "[p]racticing optometry under a false or assumed name * * *"]

5. Illinois: ILL.ANN.STAT. ch.91 § 105-13(f) (Smith-Hurd) [optometrist's license may be revoked for "[a]dvertising, practicing or attempting to practice under a name other than the full name as shown on his or her certificate of registration"]

6. Iowa: IOWA CODE ANN. § 154.4 (West) [optometrist "who shall practice or advertise as practicing his profession, under a false or assumed name shall by such advertising mislead the public to believe that he is practicing for on behalf of an unlicensed person, shall have his license revoked."]

7. Kansas: KAN.STAT. § 65-1510 [unlawful for any person to "engage in the practice of optometry under any name or title other than his or her own"]

8. Kentucky: KY.REV.STAT. § 320.300(5) [unlawful for any person to "practice optometry under any name other than his own"]

9. Maine: ME.REV.STAT. tit.32 § 2582(2) [optometrist's license may be revoked if "such person practices under a name other than that given in the certificate of registration"]

10. Massachusetts: MASS.GEN.LAWS ANN. ch. 112 § 72 (West) ["No optometric practice, other than an optometric clinic approved by the board and operated and conducted on an non-profit basis by a school or college of optometry or an association of registered optometrists, shall be conducted under any name other than that of the optometrist or optometrists actually conducting such practice."]

11. Missouri: MO.ANN.STAT. § 336.110(6) (Vernon) [optometrist's license may be revoked for "[a]dvertising, practicing or attempting to practice under a name other than one's own"]

12. Montana: MONT.REV.CODES ANN. § 66-1302(6) [unlawful for any person to "practice optometry under a false or assumed name"]

13. Nevada: NEV.REV.STAT. § 636.350 [optometrist "shall not be entitled to practice under an assumed name"]

14. New Mexico: N.M. STAT.ANN. § 67-1-11(D) [optometrist's license may be revoked for "attempting to practice under a name other than one's own"]

15. North Carolina: N.C.GEN.STAT. § 90-125 [with some exceptions, unlawful for optometrist "to advertise, practice, or attempt to practice under a name other than his own"]

16. Oklahoma: OKLA.STAT.ANN. tit. 59 § 585(f)(West) ["No person or persons shall practice optometry under any name other than his or her own proper name * * * "]

17. Oregon: ORE.REV.STAT. § 683.180(5) [no person shall "[p]ractice optometry under a false or assumed name"]

18. Tennessee: TENN.CODE ANN. § 63-822(f) [optometrist's license may be revoked for "[p]racticing under any name other than his or her own"]

19. Utah: UTAH CODE ANN. § 58-16-14 (6) ["unprofessional conduct" for optometrist to engage in "[a]dvertising, practicing or attempting to practice under a name other than his own"]

20. Vermont: VT.STAT.ANN. tit. 1695(2) [optometrist's certificate may be revoked for "[p]racticing under an assumed name"]

21. Virginia: VA.CODE § 54-388.2(g) [optometrist's certificate may be revoked for "advertising, practicing or attempting to practice under a name other than one's own name as set forth on the certificate of registration"]

22. Washington: WASH.REV.CODE § 18.53.140(5) [unlawful for any person to "practice optometry under a false or assumed name * * * "]

23. West Virginia: W.VA.CODE § 30-8-8 [optometrist's certificate may be revoked for "advertising, practicing, or attempting to practice under a name other than one's own"]

See also CAL.CODE (BUS. & PROF.) § 3125 (West) ["It is unlawful to practice optometry under a false or assumed name. However, the board may issue written permits authorizing an optometric group or optometric corporation of three or more duly licensed optometrists to use a name specified in the permit in connection with its practice."]; DEL. CODE tit.24 § 2113(F) ["No optometrist

shall cause or permit himself to be listed in a telephone directory under any name other than the name in which he is registered with the Board as holder of a valid, unrevoked license to practice in this State."]; N.J.STAT. ANN. § 45:12-11(i) [no optometrist shall list "any trade or corporate name"].

APPENDIX B

Texas is one of thirteen states that either require some members of their optometry boards to belong to a state optometric association, or require the state to select board members from a list of nominees prepared by such an association:

1. Arkansas: ARK.STAT.ANN. § 72-802 (1957) [Governor must select from list submitted by Arkansas Optometric Association]

2. Connecticut: CONN.GEN.STAT.ANN. § 20-128 (West) (1977) ["The Connecticut Optometric Society may submit to the governor a list of names from which appointees shall be chosen, subject to section 4-10, to fill any position to be held by an optometrist."]

3. Delaware: DEL.CODE tit 24 § 2102(e) [Governor must select from list submitted by Delaware Optometric Association]

4. Kentucky: KY.REV.STAT. § 320.230(1) (1976) [Governor must select four-fifths of Board from list submitted by Kentucky Optometric Association]

5. Maryland: MD.ANN.CODE art. 43 § 368 (1969) ["The Board shall be selected from a list of ten names endorsed by the Maryland Association of Optometrists."]

6. Mississippi: MISS.CODE ANN. § 73-19-7 (1974) [Governor must select from list submitted by Mississippi Optometric Association]

7. Nebraska: NEB.REV.STAT. § 71-117 (1973) [if state optometric association submits list, then state Department of Health must appoint from the list]

8. New Mexico: N.M.STAT.ANN. § 67-1-4(B) [Governor must select from list submitted by the state organization affiliated with AOA]

9. North Carolina: N.C.GEN.STAT. § 90-116 ["The Board shall be elected by the North Carolina State Optometric Society and commissioned by the Governor * * * "]

10. North Dakota: N.D.CENT.CODE § 43-13-03 [members of state board must be members in good standing of North Dakota optometric association]

11. South Carolina: S.C.CODE § 40-37-40 (1976) [five board members to be nominated "at meetings called by the president of the South Carolina Optometric Association"]

12. Tennessee: TENN.CODE ANN. § 63-805 [vacancies on board shall be filled by governor from two lists, one compiled by State Optometric Association, the other by the Associated Tennessee Optometrists]

13. Texas: TEX.REV.CIV.STAT.ANN. art 4552-2.02 (Vernon) [two-thirds of board must be "members of a state optometric association which is recognized by and affiliated with the American Optometric Association."]

See also FLA.STAT.ANN. § 463.02 (West) [Florida Optometric Association shall make recommendations to the Governor for appointments to the board]; NEV.REV.STAT. § 636.040 [state optometric association "may" make recommendations which Governor "may" accept]; N.J.STAT.ANN. § 45: 1-2.2 (West) [Governor "shall give due consideration to, but shall not be bound by, recommendations submitted by the appropriate professional organizations of this State"]; VA.CODE § 54-372 [Governor "may" make appointments to board from list submitted by Virginia Optometric Association, but "[i]n no case shall the Governor be bound to make any appointment from among the nominees of the Association."]

7 7
1 1 6 4
1 1 8 6